

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

OCTOBER TERM, 1910.

No. 2162.

738

HERMAN L. MINTON, APPELLANT,

vs.

F. G. SMITH PIANO COMPANY OF WASHINGTON, A
CORPORATION, ALIAS FREEBORN G. SMITH PIANO
COMPANY, ALIAS F. G. SMITH PIANO COMPANY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED MAY 2, 1910.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1910.

No. 2162.

HERMAN L. MINTON, APPELLANT,

vs.

F. G. SMITH PIANO COMPANY OF WASHINGTON, A CORPORATION, ALIAS FREEBORN G. SMITH PIANO COMPANY, ALIAS F. G. SMITH PIANO COMPANY, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

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In the Court of Appeals of the District of Columbia.

No. 2162.

HERMAN L. MINTON, Appellant,
vs.

F. G. SMITH PIANO COMPANY OF WASHINGTON, a Corporation, et al.

a Supreme Court of the District of Columbia.

At Law. No. 52309.

HERMAN L. MINTON, Plaintiff,
vs.

F. G. SMITH PIANO COMPANY OF WASHINGTON, a Corporation, alias
Freeborn G. Smith Piano Company, alias F. G. Smith Piano
Company, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to-wit:

1 *Declaration.*

Filed January 19, 1910.

In the Supreme Court of the District of Columbia.

At Law. No. 52309.

HERMAN L. MINTON, Plaintiff,
vs.

F. G. SMITH PIANO COMPANY OF WASHINGTON, a Corporation, alias
Freeborn G. Smith Piano Company, alias F. G. Smith Piano
Company, Defendant.

First Count. The plaintiff, Herman L. Minton, sues the defendant, the F. G. Smith Piano Company of Washington, a corporation, incorporated under the laws of the District of Columbia, having officers

and agents and offices and doing business in the District of Columbia, alias the Freeborn G. Smith Piano Company, alias the F. G. Smith Piano Company, for that the said defendant, heretofore, to wit, in the District aforesaid, in a certain prospectus and advertisement, published by its procurement and that of its officers and agents, in the Washington Post, a daily and Sunday newspaper published in said District, on, to wit, the 17th day of October, 1909, falsely and fraudulently offered and represented to the public, generally and particularly, that "a \$675. Webster Player-Piano" would be given free by said defendant as a first prize in a great counting contest, to any one who should, before 6 p. m. Tuesday, October 26, 1909, in compliance with certain requirements and "Rules Governing Contest" therein prescribed, correctly count the dots in and around a certain picture, printed as a part of said advertisement; and that "in case of ties" between two or more contestants "premiums of equal value would be given to each; that in the said prospectus and advertisement the prizes were offered absolutely free *"to successful counters"*; and that the said prospectus and advertisement was in the words and figures following, to wit:

"Free—\$675 Webster Player-Piano.

"First Prize in the Great Counting Contest of the F. G. Smith Piano Company.

"Prize No. 2—\$25 in Gold.

"Prize No. 3—\$20 in Gold.

"Prize No. 4—\$15 in Gold.

"Prize No. 5—\$10 in Gold.

"Prize No. 6— \$5 in Gold.

"These Prizes Given Absolutely Free to Successful Counters.

"Additional prizes aggregating \$4,250 will be awarded contestants in the order of merit.

"This great counting contest offers you the easiest chance you've ever had to earn a valuable prize by simply using your brains.

"All you have to do is to count the dots which appear in and around the outlined Webster Player-Piano. Then send your answer, with your name and address neatly and legibly written, to the "Contest Department", F. G. Smith Piano Co., before 6 p. m. Tuesday, October 26, 1909.

3 "Enter the contest now. All who get their answers in within the time limit have an equal chance to earn a prize.

"This liberal offer is part of our plan for extending the fame and popularity of our Webster Pianos and Player-Pianos.

"*Rules Governing Contest.*

"Count the dots and send your answer in with name and address plainly written. Only one member of a family may enter. Only

one estimate will be accepted from same contestant. No one connected with the music trade may enter. In case of ties, premiums of equal value will be given to each. Winners will be notified by mail.

"The correct number of dots is known only to the manufacturers of the Webster Piano. This number has been forwarded in a sealed envelope to the four judges of the contest, who are representatives of the four newspapers of the City of Washington. We do not know the number and the judges will not know it until they open the envelopes on the day the contest is decided.

"Remember, it costs nothing to enter this counting contest, and it requires very little time and just a little brain-work to count the dots and send in your answer. Do it now!"

"The F. G. Smith Piano Company,
"1225 Pennsylvania Avenue, Washington, D. C.

"I have counted — dots in and around the Player Piano

4 and I agree to abide by the decision of the judges.

Name, ————,
Address, ———, City ———, State ———."

"You may fill out this blank, or at your option use other paper."

"Contest closes Tuesday, Oct. 26, 1909, at 6 p. m.

"All answers must be addressed to "Contest Department."

(Signed)

"F. G. SMITH PIANO COMPANY,
"1225 Pennsylvania Avenue,
"Bradbury Building, Washington, D. C."

The plaintiff alleges that in consideration of defendant's said offer to give prizes to "successful counters," and its promise, guaranty, and warranty that "in case of ties, premiums of equal value" would be given to each, and that the judges of the contest should within a reasonable time after the said 26th day of October, 1909, decide said contest according to the said "Rules Governing Contest," and not otherwise, he, the plaintiff, was induced to accept, and did accept, the defendant's said offer, as set forth in said advertisement, at defendant's request; and that he counted the dots in and around the said picture, and ascertained the true and exact number thereof, to wit, the number 3238; that on, to wit, the 23rd day of October, 1909, plaintiff sent his acceptance, and his solution to said problem, to the defendant, addressed to the "Contest Department F. G. Smith Piano Company, 1225 Pennsylvania Avenue, N. W., Washington, D. C.," with the said name and address plainly, neatly, and legibly written on the envelope containing said acceptance and answer, and his own name and address plainly written in, and upon, and as a part of, his said acceptance and answer, which acceptance, answer and solution were in the following words and figures, to wit:

"The F. G. Smith Piano Company,
 "1225 Pennsylvania Avenue, Washington, D. C.

"I have counted 3238 dots in and around the Player Piano and I agree to abide by the decision of the judges.

"Name (Signed) HERMAN L. MINTON,
 "Address, 618 Seventh St. N. E., Washington, D. C."

The plaintiff alleges that his answer above set forth was written in exact conformity with the form recommended by the defendant in its said advertisement, and was, in fact, simply filled out on a form clipped therefrom; and plaintiff alleges that the said form was deceitfully designed and contrived by the defendant to entrap the plaintiff and others to make in advance a promise to abide by the fraud contemplated and practiced by said defendant in the premises.

And the plaintiff further alleges that his said acceptance, answer and solution were duly received, and the receipt thereof acknowledged, by the defendant; that the plaintiff is the only member of his own family who entered the said contest; that he sent to the defendant only one estimate and answer in relation to said offer and contest; and that he is not connected with the music trade in any way whatever. And so the plaintiff claims that he thus became entitled to receive from the defendant the first prize offered by the said

defendant in its said advertisement and prospectus, in case no
 6 other person entering the contest ascertained the true and exact number of dots in and around said picture and performed all the other requirements and conditions prescribed in said offer; and that, in case others besides himself fulfilled all the said conditions and ascertained the true and correct number of dots aforesaid, so that "a tie" arose, he, the plaintiff, became entitled to receive from the defendant by way of guaranty and warranty, a "premium of equal value," to wit, the value of Six hundred and seventy-five (\$675.) dollars. And plaintiff further alleges that he became entitled under said "Rules Governing Contest" to be notified by mail within a reasonable time after the receipt by the defendant of his said acceptance, solution, and answer, that he was "a winner" in said contest; and he also alleges that he became entitled to receive from the defendant within a reasonable time, the promised reward, (whether prize or premium) on demand, in compliance with the offer, warranty and guaranty so made by it in its said advertisement and prospectus. Yet the defendant, although the plaintiff was a "successful counter" and fully performed all the requirements and conditions aforesaid on his part required to be performed, in the manner prescribed in the said "Rules Governing Contest," and otherwise, has hitherto fraudulently and tortiously neglected and refused to deliver to him, the said plaintiff, either the said first prize or a premium of equal value thereto, so guaranteed and warranted by it to him and every one performing said conditions, in case of a tie; and
 7 although all events have happened, and all conditions precedent have been performed, and all periods of time have elapsed, for its doing so, and to entitle the plaintiff to main-

tain this action, yet the defendant, disregarding its said duty in the premises, has not hitherto in any manner performed its said offer, guaranty or warranty; but has deceitfully, tortiously, and fraudulently neglected and refused, and still refuses, to perform the same, in whole or in part.

And plaintiff further says that the said defendant in pursuance of its design to deceive and defraud the plaintiff in this behalf, on, to wit, the 27th day of November, 1909, addressed to the plaintiff, a letter countersigned by its Vice President, W. P. Van Wickle, admitting that the plaintiff had in his said answer and solution stated the exact number of dots in and around said picture, to wit, 3238; which said letter of the defendant was in the words and figures following, to wit:

“WASHINGTON, D. C., *November 27th*, 1909.

“Mr. Herman L. Minton, 618 7th St. n. e., City.

“DEAR SIR: The Judges in our recent Dot Counting Contest regretted that your solution while correct in number, did not measure up in the two other points, neatness and legibility, with other correctly numbered solutions submitted to them, so that under the rules governing the Contest they were unable to award you one of the advertised Prizes; however, they agreed that the originality of
8 your design should have some recognition aside from contest rules, and suggested that an extra Prize of \$2.50 in gold be awarded you as a mark of appreciation, and if you will call at our wareroom we will be pleased to carry out their suggestion.

“Very truly yours,

(Signed)

(Countersigned)

“F. G. SMITH PIANO COMPANY,

“W. P. VAN WICKLE,

“*Vice President.*”

And plaintiff further says that afterwards, to wit, on the 9th day of December, 1909, the defendant, by its Vice President and agent, W. P. Van Wickle, addressed a letter to William Bradfield, plaintiff's attorney, in reference to the subject matter of this case, in the words and figures following, to wit:

“WASHINGTON, D. C., *December 9th*, 1909.

“Mr. William Bradford, 406 5th St. n. w., City.

“DEAR SIR: We have your favor dated Dec. 8th., in which you state that a client of yours, Herman L. Minton, claims to have entered a ‘Contest’ advertised by us in the several daily papers a few weeks ago, and that he won a \$675.00 Piano which has not been delivered to him.

“This would be important if true, but unfortunately for Mr. Minton his statement is not correct, he won no prize, and
9 there is absolutely no foundation for his claim.

“In the ‘Contest’ referred to, persons were invited to compete under the printed rules governing the ‘Contest,’ in the Washington Post, and other daily papers, we calling to mind the ‘Star’ of

Oct. 21st, 1909; the rules specified that contestants were to count the dots in the advertisement, and send in their solution either on the printed coupon connected with the advertisement, or on other paper at their option; the rules also stated that neatness, legibility, and accuracy (correctness of number) were to be the *three* points to be considered by the Judges in coming to their decisions, making the awards of prizes, in other words, the mere sending in of the correct number was not of itself sufficient to win any prize, there were two other points to be complied with by all contestants; in addition to this, *every contestant* over his or her signature, had to agree *to abide by the decision of the Judges*, four (4) representatives of the Washington daily papers; Mr. Minton entered the contest with this agreement, as did all contestants, the decision of the Judges to be final; in this connection we wish to say that as advertised, this Company had nothing whatever to do with the making of the awards of Prizes, or arriving at any conclusion whatsoever relative to the awards, this was relegated to the Judges, and if Mr. Minton had any grounds for complaint, it would be against the Judges, from whose decision he agreed not to appeal, and not against the F. G. Smith Piano Co.

10 "The correct number as announced by the Judges, was 3238, and a great many persons sent in this number, among others Mr. Minton, and while they all had the correct number, one of the three points to be attained, many fell down on the other two points, neatness and legibility; the Judges went over the correctly numbered solutions, eliminating those not up to the standard of neatness and legibility, and awarded the prizes in the order of merit to those solutions which they adjudged as the neatest and most legible; the Judges did not find that Mr. Minton's solution, and many others, while correct in one point, (the right number), compared with other solutions in points of neatness and legibility, the two other points to be observed, and Mr. Minton and all others, not awarded prizes, were so advised.

"We trust we have made it plain, that sending the correct number alone did not entitle anyone to a prize, there were other conditions to be observed under the rules, nor did sending the correct number alone, by two or more persons, constitute a 'tie' under the rules, for solutions had to be not only correct in number, but so equal in point of neatness and legibility that the Judges could not discriminate between them, but that did not occur, the Judges found no solutions perfectly equal in all three points.

"If this explanation is not satisfactory, we respectfully refer you to our attorney, Mr. J. J. Darlington, for any further settlement
11 of Mr. Minton's claim.

"Very truly yours.

(Signed)

"F. G. SMITH PIANO COMPANY.

(Countersigned)

"W. P. VAN WICKLE.

"Vice President."

And the plaintiff further alleges that at the time of the publication of the said fraudulent and deceitful advertisement, the defend-

ant knew, and from that time hitherto has known, that the same was fraudulent, and that all the acts aforesaid consequential thereto, done by its agent, W. P. Van Wickle, were and have been fraudulent; and that it then and there became the duty of the defendant to inform the plaintiff and the public of these facts; yet that the defendant wholly neglected, and has ever neglected, so to do, and has thereby ratified and confirmed all said fraudulent acts of its said agent.

And the plaintiff further alleges that the said "F. G. Smith Piano Company," so-called, and the defendant, the F. G. Smith Piano Company of Washington, are in fact one and the same concern; and also, that the Freeborn G. Smith Piano Company, so-called, and the defendant, the F. G. Smith Piano Company of Washington, are in fact one and the same; and that the said W. P. Van Wickle represents, and has from the beginning represented, the defendant under its true name, in the District of Columbia, and also represents it when he, the said Van Wickle, acts, and has acted, in said District, as the agent of the said so-called "F. G. Smith Piano Company"

12 and the said so-called "Freeborn G. Smith Piano Company."

And the plaintiff further alleges, that in consideration of said representation, guaranty, and warranty, so falsely and fraudulently made by the defendant, he, the plaintiff, was deceitfully induced to accept, and did accept, the said offer of the defendant, supposing it to be *bona fide*, honest, and fair, and upon no other supposition or condition whatever; and that plaintiff's promise to "abide by the decision of the judges" in said contest was not absolute, but contingent upon said supposition and condition, and was nullified by the defendant's fraud and deceit; and that the defendant has never performed the conditions on its part offered and agreed to be performed, according to the terms of its said offer, guaranty and warranty; but has utterly, fraudulently, and tortiously neglected and refused to perform the same, to the great damage of the plaintiff, to wit, to the damage of Six hundred and seventy-five (\$675.) dollars; and therefore the plaintiff sues.

Second Count. The plaintiff, Herman L. Minton, further sues the defendant, the F. G. Smith Piano Company of Washington, a corporation, incorporated under the laws of the District of Columbia, having officers and agents and offices and doing business in the District of Columbia, alias the Freeborn G. Smith Piano Company, alias the F. G. Smith Piano Company, for that, on, to wit, the 17th day of October, 1909, in the District of Columbia, aforesaid, the defendant publicly offered, guaranteed and warranted a reward to any person who would count the dots appearing in and around the outline of a Webster Player-Piano printed in an advertisement in the

13 Washington Post of that date, which said offer, guaranty and warranty were in the words and figures following, to wit:

"Free—\$675 Webster Player-Piano.

"First Prize in the Great Counting Contest of the F. G. Smith Piano Company.

"Prize No. 2—\$25 in Gold.

"Prize No. 3—\$20 in Gold.

"Prize No. 4—\$15 in Gold.

"Prize No. 5—\$10 in Gold.

"Prize No. 6— \$5 in Gold.

"These Prizes Given Absolutely Free to Successful Counters.

"Additional prizes aggregating \$4,250 will be awarded contestants in the order of merit.

"This great counting contest offers you the easiest chance you've ever had to earn a valuable prize by simply using your brains.

"All you have to do is to count the dots which appear in and around the outlined Webster Player-Piano. Then send your answer, with your name and address neatly and legibly written, to the "Contest Department," F. G. Smith Piano Co., before 6 p. m. Tuesday, October 26, 1909.

"Enter the contest now. All who get their answers in within the time limit have an equal chance to earn a prize.

"This liberal offer is part of our plan for extending the fame and popularity of our Webster Pianos and Player-Pianos.

14

"Rules Governing Contest.

"Count the dots and send your answer in with name and address plainly written. Only one member of a family may enter. Only one estimate will be accepted from same contestant. No one connected with the music trade may enter. In case of ties, premiums of equal value will be given to each. Winners will be notified by mail.

"The correct number of dots is known only to the manufacturers of the Webster Piano. This number has been forwarded in a sealed envelope to the four judges of the contest, who are representatives of the four newspapers of the City of Washington. We do not know the number and the judges will not know it until they open the envelopes on the day the contest is decided.

"Remember, it costs nothing to enter this counting contest, and it requires very little time and just a little brain-work to count the dots and send in your answer. Do it now!

"The F. G. Smith Piano Company,
"1225 Pennsylvania Avenue, Washington, D. C.

"I have counted — dots in and around the Player Piano and I agree to abide by the decision of the judges.

"Name, _____,
Address, _____, City _____, State _____.

"You may fill out this blank, or at your option use other paper.

"Contest closes Tuesday, Oct. 26, 1909, at 6 p. m.

15 "All answers must be addressed to 'Contest Department.'
(Signed)

"F. G. SMITH PIANO COMPANY,
"1225 Pennsylvania Avenue,
"Bradbury Building, Washington, D. C."

And the plaintiff further alleges that at the time of the publication of the said fraudulent and deceitful advertisement, the defendant knew, and from that time hitherto has known, that the same was fraudulent, and that all the acts aforesaid consequential thereto, done by its agent, W. P. Van Wickle, were and have been fraudulent; and that it then and there became the duty of the defendant to inform the plaintiff and the public of these facts; yet that the defendant wholly neglected, and has ever neglected, so to do, and has thereby ratified and confirmed all said fraudulent acts of its said agent.

And the plaintiff further alleges that the said "F. G. Smith Piano Company," so-called, and the defendant, the F. G. Smith Piano Company of Washington, are in fact one and the same concern; and also, that the Freeborn G. Smith Piano Company, so-called, and the defendant, the F. G. Smith Piano Company of Washington, are in fact one and the same; and that the said W. P. Van Wickle represents, and has from the beginning represented, the defendant under its true name, in the District of Columbia, and also represents it when he, the said Van Wickle, acts, and has acted, in said District, as the agent of the so-called "F. G. Smith Piano Company" and the said so-called "Freeborn G. Smith Piano Company."

16 The plaintiff alleges that he was induced by the said offer, guaranty and warranty to count the said dots and to perform all and singular the things required to be done in pursuance thereof to entitle him to the said first prize and to the benefit of the guaranty and warranty in case of a tie among those who should ascertain the exact number of dots and comply with all and singular the conditions required of contestants; and that he did so perform and comply with said requirements as to entitle him to the benefit of the guaranty and warranty aforesaid; and that he has often requested the defendant to fulfill the said guaranty and warranty and to deliver to the plaintiff a premium equal in value to a six hundred and seventy-five (\$675.) dollar Webster Player-Piano; but that the defendant hitherto has neglected and refused, and still neglects and refuses, so to do, and has wholly broken its said guaranty and warranty, although all events have happened, and all conditions precedent have been performed, and all periods of time have elapsed, for its doing so, and to entitle the plaintiff to maintain this action. And therefore the plaintiff sues the defendant for \$675. due and owing to the plaintiff in consideration of its breach of said guaranty and warranty.

And plaintiff claims of the defendant in all, the sum of Six hundred and seventy-five (\$675.) dollars, besides the costs of this action.

WILLIAM BRADFELD,
Attorney for Plaintiff.

17

Demurrer to First Count of Declaration.

Filed February 11, 1910.

* * * * *

The defendant says that the first count of the plaintiff's declaration is bad in substance.

J. J. DARLINGTON,
S.,
Attorney for Defendant.

NOTE.—One of the matters of law intended to be argued on the hearing of the foregoing demurrer is, that the facts stated in the first count of the plaintiff's declaration do not show that the plaintiff was a "winner" in the counting contest referred to in said count.

J. J. DARLINGTON,
S.,
Attorney for Defendant.

Demurrer to Second Count of Declaration.

Filed February 11, 1910.

* * * * *

The defendant says that the second count of the plaintiff's declaration is bad in substance.

J. J. DARLINGTON,
S.,
Attorney for Defendant.

18

NOTE.—One of the matters of law intended to be argued on the hearing of the foregoing demurrer is, that the facts stated in the second count of the plaintiff's declaration do not show that the plaintiff was a "winner" in the counting contest referred to in said count.

J. J. DARLINGTON,
S.,
Attorney for Defendant.

(Endorsed.)

If the plff. was induced into a contract by fraud, he can either rescind or affirm it; not both. If he affirms it, *he* must abide by its terms, as well as the other party. By suing for its breach, he appears to affirm it; one of its terms is, that he shall abide by the decision of the judges and this term is obligatory unless there was a fraudulent award by the judges. In the absence of any averments of fact which if true would show a fraudulent award by the judges, in-

deed in the absence of even an averment that the judges have or have not decided, he shows only a state of fact in which he can have no right of action. Dem. sustained.

WRIGHT.

19 Supreme Court of the District of Columbia.

FRIDAY, *February* 18, 1910.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * *

Upon hearing the defendant's demurrers to the plaintiff's declaration, it is considered that said demurrers be, and they are hereby sustained.

MONDAY, *February* 28, 1910.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * *

It appearing that the defendant's demurrers to the plaintiff's declaration herein were sustained on the 18th day of February, 1910, and the plaintiff now in open Court says he does not care to amend said declaration, but will stand upon the same as originally filed, it is ordered that judgment on said demurrers be entered.

Therefore it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day, and recover against the plaintiff the costs of its defense, to be taxed by the Clerk, and have execution thereof.

20 From the foregoing the plaintiff in open Court notes an appeal to the Court of Appeals of the District of Columbia, and, upon motion, the penalty of the bond for costs on said appeal is hereby fixed in the sum of one hundred dollars (\$100.).

Memorandum.

March 21, 1910.—Appeal bond filed.

Directions to Clerk for Preparation of Transcript of Record.

Filed March 28, 1910.

* * * * *

The Clerk of said Court will please prepare transcript of record on appeal, and include:

1. Declaration, (Filed Jan'y 19/10.)
2. Demurrer to declaration, " Feb'y 11/10.
3. Order sustaining Demurrer, " 18/10.
4. Judgment, " 28/10.
5. Appeal bond (memo.) March 21/10.
6. This designation, " 28/10.

WILLIAM BRADFELD,
Attorney for Plaintiff.

21 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 20, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 52309 at Law, wherein Herman L. Minton is Plaintiff and F. G. Smith Piano Company of Washington, a corporation, &c. is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 26th day of April, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2162. Herman L. Minton, appellant, vs. F. G. Smith Piano Company of Washington, a corporation, et al. Court of Appeals, District of Columbia. Filed May 2, 1910. Henry W. Hodges, clerk.

